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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES ASHLEY
Petitioner

VERSUS

EPIC DIVERS, INC. AND
CIGNA INSURANCE COMPANY
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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HOPP

QUESTIONS PRESENTED FOR REVIEW

Is the Fifth Circuit's "permanent attachment to a specific vessel or a specific fleet of vessels test" for qualification as a seaman under the Jones Act, which is a test not adopted by this court, a test which, in order for seaman status to be present, must be fulfilled by all would-be seamen? Or, on the other hand, may a qualitative approach consistent with the approach taken by this court, focusing upon work at sea in the service of the ship, be used?

Are commercial divers, even those who perform 100 percent of their work on or from vessels, to be denied seaman status, for Jones Act coverage, because their diving company employers assign their jobs randomly with the result that they are not permanently attached to any one specific vessel or any one specific fleet of vessels?

If the Fifth Circuit's "permanent attachment test" is or would become the law of the nation with respect to seaman status for Jones Act purposes, what is the criterion for "permanency"? Would that not be a mixed question of law and fact? Could a jury find that a four-day assignment of seaman's work aboard a vessel constitutes sufficient assignment to that vessel for achievement of Jones Act seaman/crew member status with respect to it (e.g., an assignment of a commercial diver to a dive boat as to which he, his diving tender, and the boat captain are to be the only crew members for the four-day diving mission or, e.g., hypothetically, an assignment of a card-carrying seaman from the union hall for a four-day trip between New Orleans and Mobile, even though neither the diver nor the card-carrying seaman had previously served on the same vessel or expected to do so again)?

LIST OF PARTIES TO THIS PROCEEDING

The only parties to this proceeding are:

1. Charles Ashley

2. Epic Divers, Inc.

3. CIGNA Insurance Company

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STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit as to which review is sought herein was entered on September 22, 1992. Denial of the petition for rehearing was entered on October 20, 1992. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

This matter involves the following statutes:

A. 46 U.S.C.A. Section 688(a), more commonly referred to as the Jones Act:

688(a) Application of Railway Employee Statutes Jurisdiction.

Any SEAMAN who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with a right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; in the case of the death of any seamen as a result of any such personal injury, a personal representative of such seamen may maintain an action for damages at law with a right of trial by jury, and in such action all statutes of the United States conferring or regualting the right of action

for death in the case of railway employees shall be applicable. This jurisdiction and such action shall be under the Court of the district in which the defendant/employer resides or in which his principal office is located.

B. 33 U.S.C.A. § 902(3)(G), the pertinent section of the statute commonly referred to as the Longshore and Harbor Workers' Compensation Act:

(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and shipbreaker, but such term does not include—

G) a master or member of a crew of any vessel; . . .

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

Petitioner, Mr. Charles Ashley, a commercial diver, sues his employer, Epic Divers, Inc. (hereinafter Epic), under the Jones Act and general maritime law for damages resulting from injuries sustained on November 20, 1990, while he was assigned to a dive boat for a four-day diving job in the Mississippi River. On the day of the accident, Mr. Ashley was sent to the hospital by his employer, and remained hospitalized for 11 days and remains under outpatient care through the present, but as of the filing of the suit, February 13, 1991, no payments of any kind had been made to Mr. Ashley and most of his hospital and doc-

tor bills had not been paid, and accordingly, he also sued under the general maritime law for maintenance and cure and for attorney fees and damages for failure to pay maintenance and cure.[1] Also named as a defendant is Epic's employer's liability insurer, CIGNA Insurance Company, which is sued under the Louisiana direct action statute, La. R.S. 22:655.

Epic and its insurer moved for a summary judgment dismissing all claims upon the contention that plaintiff did not have seaman status. This motion for summary judgment was granted. The district court ruled that *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5 Cir. 1986), requires that commercial divers be found not to have seaman status if their work is assigned by their employers randomly to various unrelated vessels rather than to a related fleet of vessels. The district court ruled that a commercial diver, even one who performs 100 percent of his work on or from vessels, is "not exempted from the *Barrett* rule that a worker must work aboard a fleet of vessels under one owwnership or control to qualify as a Jones Act seaman."

The United States Court of Appeals for the Fifth Circuit affirmed, ruling:

> To qualify as a Jones Act seaman, Ashley must show: (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet; and (2) his work contributed to the function or mission of the vessel or fleet. . . . In *Bach v. Trident S.S. Co.*, 920 F.2d 322 (5th Cir.), *vacated* ____ U.S. ____, 111 S. Ct. 2253,

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[1] Subsequent to the filing of suit, Epic paid the medical bills and began paying Longshoremen's and Harbor Workers' Compensation Act benefits, bringing Mr. Ashley up to date, and contends that his exclusive remedy is under that act.

reinstated, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1996 (1992), this court held that workers who perform traditional seaman's duties must nevertheless meet the attachment to a vessel or fleet requirement. *Id.* at 324-26. Ashley presents a strong argument against the rule of *Bach*, but this panel is bound thereby and has no latitude to deviate from it. While prior panels have expressed more liberal views, we find no prior panel holding in conflict with *Bach*.

* * *

Epic is an independent contractor that sends its divers to customers requesting diving services. Epic, which did not own or charter the vessels on which Ashley worked, randomly assigned Ashley to various customers. Because of fluctuations in Epic's business demand, Ashley worked only five jobs, all of which were performed on different vessels. Ashley's first two jobs, totaling 8 days, were performed on vessels owned by the same company, Torch, Inc., but this common ownership was fortuitous. His injury occurred on his fifth job, which was supposed to last four days, on a boat not owned by Torch. All five jobs were for a definite time and never lasted longer than four days. Because Ashley fails to meet the attachment to a vessel or fleet requirement, we affirm the district court's summary judgment.

Rehearing was denied. Mr. Ashley applies for a writ of certiorari.

B. Statement of the Facts

Plaintiff/appellant, Mr. Charles Ashley, is a very ex-

perienced commercial diver. His experience includes saturation diving. He was recruited by Epic because of his diving knowledge and experience. He was told that Epic wanted to upgrade its diving corps, that Epic was going to get substantial saturation diving jobs with its upgraded corps of divers, and that he would have a good future with long and steady diving work with Epic. It is because of this representation that Mr. Ashley became employed, and remained employed, by Epic.

Mr. Ashley did not perform work for Epic other than diving. He did not work in the warehouse, in the yard, or in any projects other than actual diving on and from vessels. One hundred percent of Mr. Ashley's employment with Epic was as a diver, doing diving work from vessels. One hundred percent of Mr. Ashley's work with Epic was ship's work, fulfilling the mission of the vessel from which he was diving at the time.

Apparently because Epic's business was slow while it was building up its saturation diving customer base, Mr. Ashley dove on only 14 days while employed by Epic. (Each diving day was a 12-hour, or more, workday.) Eight of those 14 days involved diving work from vessels which were part of the Torch, Inc. (hereinafter Torch), fleet of pipeline vessels. During those eight days he ate and slept on the vessels. Four of those eight days were spent on one of Torch's pipeline barges and the remaining four days on another of Torch's pipeline barges.

Mr. Ashley's next job was a single-day underwater surveying job performed on and from a vessel owned or chartered by Chevron.

Mr. Ashley's next job, which lasted four days, was diving work done from Chevron self-propelled barges, the

mission of which was the scrapping of old underwater flow lines.

The next job, which was expected to last four days, was the job during which the accident occurred. This job was performed from a small dive boat in the Mississippi River. During the entirety of the time that Mr. Ashley was on this job (the accident occurred toward the end of the first day of that job), the mission of the dive boat was exclusively the diving work which Mr. Ashley was performing. He, his diving tender, and the boat captain were the only crew of the vessel.

The accident at issue occurred when Epic's diving equipment aboard the dive boat failed to put out adequate air, and put out foul air, while Mr. Ashley was diving, and Mr. Ashley received a serious decompression/neurological injury as a result thereof and his forced quick ascent to the water suface.

ARGUMENT

In *McDermott Intern., Inc. v. Wilander,* 498 U.S. ____, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), this court, to resolve the issue as to whether one must aid in the navigation of a vessel in order to qualify as a "seaman" under the Jones Act, 46 U.S.C. 688, traced the jurisprudence flowing from this court relative to the definition of the word "seaman," noting that the Jones Act does not define "seaman." In *Wilander,* this court jettisoned any requirement that one must aid in the navigation of a vessel in order to be a seaman. This court then stated, "The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the

work of a vessel" (111 S.Ct. at 817).

In *Wilander,* this court also noted "Our wayward case law has led the lower courts to a myriad of standards and lack of uniformity in administering the elements of seaman status" (111 S.Ct. at 816).

The United States Court of Appeals for the Fifth Circuit has adopted its own standard, making *permanent attachment* to a *specific vessel* or a *specific commonly-owned fleet of vessels* an absolute requirement for all seamen under all circumstances. This standard was used to deny seaman status in the instant case.

The first question presented herein is whether this Fifth Circuit standard is the correct and only standard. In the instant case, the Fifth Circuit has imposed an absolute—applicable to all—requirement of permanency. This court has made no such imposition. To the contrary, the jurisprudence emanating from this court does not set out a requirement of a "permanent attachment," and this court's decisions which can be said to be on point or controlling as to whether a person such as Mr. Ashley who has performed 100 percent of his employment duties on and in fulfillment of the mission of vessels when they are at sea on their voyages teach that such activity suffices for seaman status.

This court in *Warner v. Goltra,* 293 U.S. 155, 55 S.Ct. 46, 79 L.Ed. 254 (1934), ruled:

> . . . a seaman is a mariner of any degree, one who lives his life upon the sea. *It is enough* that what he does affects 'the operation and welfare of the ship *when she is upon a voyage.*'
> (Emphasis added)
> (79 L.Ed. at 257)

In *Swanson v. Marra Bros.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), this court ruled:

> We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel *plying in navigable waters*. . . .
> (Emphasis added)
> (90 L.Ed. at 1049)

In *Wilander, supra*, this court stated:

> We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction. *All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.*
> (Emphasis added)
> (111 S.Ct. at 817)

Under the above, Mr. Ashley would have seaman status. *All* of his employment, including his employment at the moment of the accident, was on a vessel "plying in navigable waters." Certainly divers, such as Mr. Ashley, are subject to the perils of the sea. It is difficult to imagine any seamen more subject to the perils of the sea than divers. Under this court's guidelines as set out in *Warner, Swanson*, and *Wilander*, Mr. Ashley would not be denied seaman status.

The "*Robison* test," in which "permanent attachment" is one of the test factors, was set out in *Offshore*

Company v. Robison, 266 F.2d 769 (5 Cir. 1959), where the court was fashioning a test for oil field workers who were working offshore in land-type work but often from vessels as well as fixed drilling platforms.

Since its genesis in 1959, the *Robison* test has been used by the Fifth Circuit to delineate those nouveau amphibious seamen. See the history of the application of the *Robison* test which is traced by professor Robertson in *A New Approach to Determining Seaman Status*, 64 Texas L.Rev. 79 (1985), which was cited by this court in *Wilander*. Professor Robertson there concluded that the better criterion (better than the *Robison* permanent-attachment-to-a-specific-vessel-or-specific-commonly-owned-fleet-of-vessels criterion) is that a worker would have seaman status "(1) when a substantial part of his duties are performed on vessels, and (2) his work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable water" (64 Texas L.Rev. at 120). This criterion is consistent with, and fairly embodies, the teachings of this court in *Warner*, *Swanson*, and *Wilander*. The work of Mr. Ashley would fulfill this criterion.

Sitting *en banc* in 1986 relative to the issue of seaman status of amphibious oil field workers, the Fifth Circuit in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5 Cir. 1986), reiterated the *Robison* test for such workers but *expressly*, in Footnote 13, stated that it did "*not decide*" whether the principle governs the crew member status of maritime workers who spend virtually all of their time on vessels doing work on short voyages aboard a large number of vessels.

Now the Fifth Circuit has ruled that fulfillment of the *Robison* test is an absolute requirement for all seamen.

The instant decision followed on the heels of *Bach v. Trident S.S. Co.*, 920 F.2d 322 (5 Cir. 1991), vacated ____ U.S. ____, 111 S.Ct. 2253, reinstated, 947 F.2d 1290 (5 Cir. 1991), cert. denied, ____ U.S. ____, 112 S.Ct. 1996 (1992). In the original *Bach* decision, the Fifth Circuit, Judge Brown dissenting, applied the "permanent attachment" *Robison* test to deny seaman status to a state-required compulsory pilot allegedly injured aboard an oceangoing vessel in the Mississippi River. In *Bach*, the Fifth Circuit stated:

> The question we reserved in *Barrett* faces us today. In particular, we must decide whether to exempt workers who perform traditional seaman's work on a large number of unconnected vessels from the vessel connection prong of our test for seaman status.
>
> * * *
>
> A large body of law, developed through a case-by-case application of the *Robison* test, provides the means for deciding which workers are entitled to the benefits of the Jones Act.
>
> * * *
>
> We decline the invitation now to make a wholesale exception to a test that has served us for so long.
> (920 F.2d at 324 and 326)

As to that original decision, this court, 111 S.Ct. 2253 (1991), granted certiorari, vacated the judgment, and remanded for reconsideration in light of *Wilander*. The Fifth Circuit panel, Judge Brown again dissenting, then reinstated its original ruling. Certiorari of that decision was denied, 112 S.Ct. 1996 (1992). A review of the respondents' brief to the application for writs to the *Bach*

decision on remand reveals an argument that the respondents were entitled to their summary judgment whether or not seaman status was present, and that, accordingly, the case was inappropriate for review. This court did not set out the reason that the writ was denied. Of course, that denial of the writ does not constitute a position of this court on the matter. As noted in *Moore's Federal Practice,* Second Edition, at Section 400.05-2[4], "Cases are legion in holding that the Supreme Court expresses no opinion on the merits of a case when it denies a petition for a writ of certiorari."

As set out in the heretofore-quoted portion of the decision in the instant case, the Fifth Circuit there stated that the *Bach* panel had held that workers who perform traditional seaman's duties must nevertheless meet the permanent-attachment test and that though Mr. Ashley presents a strong argument against the rule of *Bach*, the court is bound by the *Bach* decision and has no latitude to deviate from it.

Now with *Bach* and the instant decision, the Fifth Circuit makes the permanent-attachment requirement etched in stone and applicable to all seamen in all circumstances.

It is respectfully submitted that the Fifth Circuit's ironclad requirement, which at least in certain applications is not consistent with the criterion set out by this court in *Swanson, Warner,* and *Wilander,* is erroneous, at least insofar as it is stated to be an absolute requirement for all.

Moreover, a seaman's right to the Jones Act ought not to depend upon the happenstance of whether his employer assigns him to work for only one of the employer's customers (i.e., to a specific commonly-owned

fleet—such that the *Robison* test would be fulfilied) or whether, on the other hand, the employer assigns him randomly to jobs.

The United States Court of Appeals for the Fifth Circuit itself has held that commercial divers, in light of the fact that they are traditional seamen and face the perils of the sea, are not subject to the "permanent attachment" requirement. In *Wallace v. Oceaneering Intern.*, 727 F.2d 427 (5 Cir. 1984), the Fifth Circuit held that a commercial diver has the legal protections of a seaman so long as a substantial part of his duties are performed on vessels. In *Wallace*, the Fifth Circuit ruled:

> We hold that a commercial diver, who embodies the traditional and inevitably maritime task of navigation, has the legal protections of a seaman when a substantial part of his duties are performed on vessels. It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes Wallace a seaman.
>
> * * *
>
> A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime becaues it cannot be done on land. It is not, like so many offshore oil field operations, an art developed in land work and transposed to a marine setting.
>
> * * *
>
> Moreover, when a diver descends from the surface, braving the darkness, temperature, lack of

> oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel. Before he can complete his assigned task, he must successfully navigate the seas.
> (Emphasis added)
> (727 F.2d at 436)

In *Wallace*, the Fifth Circuit expressly addressed and rejected the single fleet-of-vessels criterion as it might apply to divers. There the court held:

> That principle was applied to the converse situation in *Bertrand v. International Mooring & Marine*, 700 F.2d 240 (5th Cir.1983), which is closely on point with this case. There, workers who spent a large majority of their time on vessels, albeit randomly owned vessels, performing the undeniably maritime task of anchorhandling were killed in an auto accident while returning from a seven-day assignment aboard a vessel. We held that they were Jones Act seamen, even though they were fortuitously injured on land. *More importantly, we reversed the district court's holding that because the workers were not assigned to any commonly-owned fleet of vessels or any one vessel they were not Jones Act seamen. We explained:*
>
> * * *
>
> To require common ownership or control when seamen work on several vessels but not when they work on a single vessel is inconsistent with the liberal construction of the Jones Act that has characterized it from the beginning and is inconsistent with its purposes. *Accord Robison*, 266 F.2d at 780.

* * *

> The group of vessels concept has been used to expand coverage under the Jones Act, not restrict it.
>
> * * *
>
> In light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned. (Emphasis added)
> (727 F.2d at 435)

The ruling of the Fifth Circuit in the instant case, it is respectfully submitted, is directly contradictory of the above-quoted ruling which it had earlier made in the *Wallace* case.

Virtually all diving companies assign their divers to work on vessels belonging to others. Virtually all divers will lose their seaman's rights if the decision below is allowed to stand.

This court has expressly rejected the concept that a maritime worker can lose his rights because of his employer's contractual arrangements. It did so in *Reed v. Steamship Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419 (1967).

When the *Reed* and *Jackson* cases were decided, longshoremen (*Sieracki* seamen) had the right to sue vessel owners for damages under the Doctrine of Unseaworthiness for injuries they sustained because of unsafe equip-

ment or conditions aboard the vessels they were servicing. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946).

In *Reed* and *Jackson*, the defendant shipowners contended that the contractual relationships or absence thereof relative to their vessels and the longshoring services provided thereto had the result that the longshoremen providing longshoring services aboard their vessels did not have a remedy under the Doctrine of Unseaworthiness. This court rejected those arguments and held that the worker's rights to unseaworthiness cannot be made to depend on the contractual relations or absence thereof of his employer. In *Reed, supra*, this court held:

> . . . a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and [that] the shipowner's obligation is rooted, not in contracts, but in the hazards of the work.
>
> * * *
>
> We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual contest, 'All were subjected to the same danger. All were entitled to like treatment under law.'
> (10 L.Ed.2d at 452 and 453)

In *Jackson, supra*, this court ruled:

> In the final analysis the contention here against recovery as in *Yaka* is that the longshoreman who is employed to work on a ship by an independent stevedore company instead of the shipowner can recover for the unseaworthiness of the vessel, but a longshoreman hired by the same shipowner to do exactly the same kind of work on an unseaworthy ship cannot recover. We reject this contention as we did before. We cannot accept such a construction of the Act—an Act designed to provide equal justice to every longshoreman similarly situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act.
> (87 S.Ct. at 1422)

The *Reed* and *Jackson* decisions by this court certainly teach that an employer's contractual happenstance (there that the longshoreman's employer happened to also be shipowner—here that the seaman's employer does not own or charter the vessels on which it assigns its employee divers and/or that the employer assigns the jobs randomly) should not be used to deprive a maritime employee of his remedies. Like the LHWCA, the Jones Act is to be broadly construed in favor of its protected employees and is an act designed to provide equal rights to all seamen. See, for example, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

It is to be noted that the Fifth Circuit in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5 Cir. 1983), expressly ruled:

> In light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties

> regarding the vessel's operation or by the manner in which work is assigned.
> (700 F.2d at 245)

The term "seaman" is not defined in the Jones Act. The Fifth Circuit's new creation of an ironclad applicable-to-all, in all circumstances, formula for seaman status which would allow random, or purposeful, assignment of seamen to be the determinative factor in whether the seamen have rights under the Jones Act is, it is respectfully submitted, error and should be reversed.

By far the better rule is the criterion laid down by this court in *Swanson, supra; Warner, supra;* and *Wilander, supra,* which is fairly embodied in the previously-quoted articulation of the criterion in *A New Approach to Determining Seaman Status, supra.*

It is respectfully submitted that on the above basis, the decision in the court below should be reversed and the case remanded.

In the alternative, if the Fifth Circuit permanent-attachment rule is or would become the law applicable to all seamen, what is the criterion for "permanency"? It is respectfully submitted that a jury could find that a four-day assignment for the mission of the vessel has sufficient "permanence." If a member of a seamen's union who accepts an assignment at the union hall for a four-day turn-around between New Orleans and Mobile on a ship on which he has never previously served and on which he has no expectation of serving again is injured aboard the ship during the first day, are Jones Act rights to be denied him because he did not have a sufficiently permanent attachment to the vessel? His tenure is exactly the same as Mr. Ashley's. What is the bench mark of "permanence"?

In the instant case, Mr. Ashley was certainly a crew member of the vessel to which he was assigned. He, his diving tender, and the captain of the vessel were the vessel's only crew. His activities were not only in furtherance of the mission of the vessel, his diving activities were the very *raison d'etre* of the vessel's four-day mission. As held by this court in *Wilander*, and reiterated by this court in *Southwest Marine, Inc. v. Gizoni*, ____ U.S. ____, 112 S.Ct. 486 (1991), the worker need not aid in navigation of a vessel to qualify as a seaman under the Jones Act.

Clearly, Mr. Ashley was a member of the crew of the dive boat.

The question of who is a "seaman" under the Jones Act is a mixed question of law and fact. Even in cases in which the facts are undisputed, summary judgment is improper if reasonable persons might draw conflicting inferences from those facts. If reasonable persons, applying the proper legal standard, could differ as to whether an employee was a "member of a crew" and thus a "seaman" under the Jones Act, it is a question for the jury. See, for example, *Wilander, supra*, and *Gizoni, supra*.

Even under the Fifth Circuit's "permanent attachment" test, a jury could, and should, find that the four-day assignment for the mission of that vessel was "sufficiently permanent" for crew member/seaman status for Jones Act coverage purposes.

It is respectfully submitted that even if the permanency test is now part of the law and cast in stone for application to all in all circumstances, summary judgment on the issue of "permanency" is improper when the vessel assignment at issue is a four-day assignment as a member of the crew of the vessel for the accomplishment of that vessel's mission.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue, the decision of the court below be reversed, and the case remanded because (1) the requirement of permanent attachment to a specific vessel or a specific fleet of commonly-owned vessels is not a requirement which must be fulfilled in all seaman status determinations in order for seaman status to be present, (2) that requirement need not have been fulfilled in the instant circumstances, and (3) alternatively, the granting of summary judgment against seaman status for a crew member for a four-day vessel mission was improper because the degree of "permanency" required under the test has no absolute bench mark and is a mixed question of law and fact.

Respectfully submitted,

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Charles Ashley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been served upon Mr. Peter L. Hilbert, Jr., McGlinchey, Stafford, Cellini & Lang, 643 Magazine Street, New Orleans, Louisiana 70130, by placing same in the United States mail, postage prepaid and properly addressed.

HOUMA, LOUISIANA, this 13th day of January, 1993.

PHILIP E. HENDERSON

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9551

Filed
SEP 22 1992

CHARLES ASHLEY,

Plaintiff-Appellant,

versus

EPIC DIVERS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CA-91-0639)

Before REAVLEY, HIGGINBOTHAM and DUHE', Circuit Judges.

PER CURIAM:[1]

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Charles Ashley appeals the district court's summary dismissal of his Jones Act claim. We affirm.

I. BACKGROUND

Ashley, a commercial diver, was employed by Epic Co., a company that supplies diving services to its offshore and shipping customers. During his four months of employment with Epic, Ashley worked on five diving jobs for a total of 14 days. The diving accident at issue occurred on his fifth diving job. Ashley sued Epic and its insurer under the Jones Act, and the district court granted summary judgment after determining that Ashley was not a seaman for purposes of the Jones Act.

II. DISCUSSION

To qualify as a Jones Act seaman, Ashley must show: (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet; and (2) his work contributed to the function or mission of the vessel or fleet. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1072-74 (5th Cir. 1986) (en banc); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959). In *Bach v. Trident S.S. Co.*, 920 F.2d 322 (5th Cir.), vacated ___ U.S. ___, 111 S. Ct. 2253, *reinstated*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1996 (1992), this court held that workers who perform traditional seaman's duties must nevertheless meet the attachment to a vessel or fleet requirement. *Id.* at 324-26. Ashley presents a strong argument against the rule of *Bach*, but this panel is bound thereby and has no latitude to deviate from it. While prior panels have expressed more liberal views, we find no prior panel holding in conflict with *Bach*.

The issue in this case is whether Ashley performed a

substantial part of his work on a "fleet" of vessels. In *Barrett,* we clarified the meaning of fleet: "By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." *Barrett,* 781 F.2d at 1074. To meet the attachment to a fleet requirement, Ashley must show that he was not merely a transitory maritime worker. *See id.*

Ashley, who worked on short voyages aboard a number of unrelated vessels, was a transitory worker. Epic is an independent contractor that sends its divers to customers requesting diving services. Epic, which did not own or charter the vessels on which Ashley worked, randomly assigned Ashley to various customers. Because of fluctuations in Epic's business demand, Ashley worked only five jobs, all of which were performed on different vessels.[2] All five jobs were for a definite time and never lasted longer than four days. Because Ashley fails to meet the attachment to a vessel or fleet requirement, we affirm the district court's summary judgment.

AFFIRMED.

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[2] Ashley's first two jobs, totaling 8 days, were performed on vessels owned by the same company, Torch, Inc., but this common ownership was fortuitous. His injury occurred on his fifth job, which was supposed to last four days, on a boat not owned by Torch.

APPENDIX B

MINUTE ENTRY
McNAMARA, J.
DECEMBER 3, 1991

FILED
Dec 4 10:58AM '91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES ASHLEY	*	CIVIL ACTION
VERSUS	*	NO. 91-639
EPIC DIVIERS, INC. AND CIGNA INSURANCE CO.	*	SECTION "D"

Before the court is Defendants' Motion for Summary Judgment. Plaintiff opposes this Motion. These Motions are before the court on briefs, without oral argument.

Plaintiff, Charles Ashley, was a diver employed by Defendant, Epic Divers, Inc. Defendants, through their Motion, seek a judicial declaration that Plaintiff was not a seaman within the meaning of the Jones Act, 46 U.S.C. § 688, at the time of his alleged accident. For reasons set forth below, Defendant's Motion for Summary Judgment is **GRANTED**.

To qualify as a Jones Act seaman, the Plaintiff must prove that he performed a substantial amount of his work aboard a vessel or was permanently assigned to a vessel or an identifiable fleet of vessels and that his work duties contributed to the mission of the vessels. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959); *Munguia v. Chevron U.S.A.*, 768 F.2d 649 (5th Cir. 1985). The Fifth Circuit further defined the fleet requirement for Jones Act status in

Date of Entry DEC 4 1991

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986), holding:

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers...is totally obliterated.

The *Barrett* court established one exception to its fleet requirement, noting:

> [W]e do not decide whether the same principle governs the crewmember status of the maritime worker who spends virtually all of his time performing traditional seaman's duties - work closely related to the *movement* of vessels - but does his work on short voyages aboard a large number of vessels. *See Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983). Bertrand and his fellow anchor handlers are good examples of this type worker.

Id. at 1075 n.13 (emphasis added).[1] Therefore, only a very

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[1] In *McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. 807, 817-18 (1991), the Supreme Court held that a worker need not aid in the navigation of a vessel in order to qualify as a seaman under the Jones Act. Reaching this conclusion, the Court affirmed the *Robison* test for seaman status, noting "[t]he Fifth circuit correctly determined that, regardless of its language, [the Supreme Court] was no longer requiring that seamen aid in navigation....*As part of its test for seamen satatus, Robison* requires that a seaman's duties 'contribute to the function of the vessel or the accomplishment of its mission.' " (emphasis added).

The Supreme Court specifically noted that the *Robison* requirement that a seaman must contribute to the vessel's mission was only part of

limited type of maritime worker is exempted from the *Barrett* rule that a worker must work aboard a fleet of vessels under one ownership or control to qualify as a Jones Act seaman.

Plaintiff argues, and Defendants agree, that diving is traditional maritime activity. Plaintiff cites *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 436 (5th Cir. 1984)[2], for the proposition that diving "embodies the traditional and inevitably maritime task of navigation, [and] has the legal protections of a seaman when a substantial part of his duties are performed on vessels."[3] However, neither *Wallace*, nor subsequent cases addressing the status of divers, suggest that diving, in and of itself, is closely related to the *movement* of the vessel.

Moreover, the Fifth Circuit was certainly mindful of its earlier decision in *Wallace* when in *Barrett* it carved out

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Footnote continued.

the test for seaman status. As noted in the text of this Minute Entry, *Robison* further requires that the seaman satisfy the fleet requirement. *Wilander*, therefore, does nothing that would broaden the narrow exception to the fleet requirement found in *Barrett* footnote 13.

[2] Note that the Fifth Circuit decided *Wallace* almost two years before deciding *Barrett*.

[3] It should be noted that *Wallace* is factually distinguishable from the case before this court. In *Wallace*, the parties stipulated that Wallace contributed to the mission of a vessel in navigation, and that Wallace was exposed to maritime perils with continued regularity. Wallace worked 95 percent of his time offshore, and ate and slept on the vessel. The vessel's mission involved drilling operations, and the court noted that the "services of the diving crew were essential to the completion of the drilling operation and to the *completion of the drilling operation and to the movement* of the [vessel] from one drilling spot to another." Although injured on a temporary assignment, Wallace was permanently assigned to a different vessel. *Wallace*, 727 F.2d at 427, 431-33. (emphasis added).

an exception to the fleet requirement. In *Barrett*, footnote 13, the court provided a specific example of the type of maritime worker who is exempt from the fleet requirement, citing the Plaintiff in *Bertrand*, an anchor handler, as a good example. *Barrett*, 781 F.2d at 1075. The *Bertrand* court described the anchor handler's duties as "securing anchors loosened by bad weather and relocating drilling rigs," and "readying the vessel for its mission;" noting that "the anchorhandlers' work from the vessels was their primary duty, and not merely accidental to work on shore or *a nonvessel*. *Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983). In providing this example, the *Barrett* court took pains to emphasize that the exception to the fleet requirement was limited to a narrow type of maritime worker.

Mindful of the above, this court examined the particular diving assignments of this individual Plaintiff, concluding that he is not the type of maritime worker that the Fifth Circuit intended to exempt from the fleet requirement. Plaintiff performed five diving jobs while employed by Epic Divers, Inc., from August 16, 1990, until his alleged injury on November 20, 1990.[4] None of these diving jobs were directly related to the *movement* of the vessel, as required by the court in *Barrett*.

The first job was for Epic's customer Torch, Inc. Plaintiff dove for four days off a Torch, Inc. pipeline barge in the Gulf of Mexico, checking or replacing anodes on offshore pipelines. Plaintiff worked strictly as a diver, he performed no maintenance or navigational functions.[5]

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[4] Plaintiff dove on fourteen days in performing these five jobs.

[5] *see* Defendants' Memorandum at p. 2 (citing deposition testimony), and Plaintiff's Memorandum in Opposition at p. 2.

The second job was also for Torch, Inc. Plaintiff dove for four days off Torch, Inc.'s barge, the LITTLE SHANE, in the Gulf of Mexico, setting a riser and boat bumpers on an offshore platform. Again, Plaintiff worked strictly as a diver.[6]

The third job was for Epic's customer, Chevron, Inc. Plaintiff dove for one day off the rear deck of a mud boat outside Venice, Louisiana, surveying a mud mat underneath an offshore platform.[7]

The fourth job was also for Chevron, Inc. Plaintiff worked for five days from small self-propelled barges, installing a clamp and scrapping old flow lines in Chevron's Quarantine Bay field. This job was performed in shallow water, allowing Plaintiff to stand with his head above water for a good portion of the job.[8]

The fifth and final job was for Epic at Avondale. Plaintiff was injured on the first day diving off a small boat in the Mississippi River, attempting to place a plywood cover over an open grate beneath the water line of a Navy ship.[9]

As is clear from this recitation of Plaintiff's diving activity, none of Plaintiff's work can be defined as "traditional seaman's duties - *work closely related to the*

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[6] *see* Defendants' Memorandum at p. 2-3 (citing deposition testimony), and Plaintiff's Memorandum at p. 2.

[7] *see* Defendants' Memorandum at p. 3 (citing deposition testimony), and Plaintiff's Memorandum at p. 3.

[8] *see* Defendants' Memorandum at p. 3 (citing deposition testimony), and Plaintiff's Memorandum at p. 3.

[9] *see* Defendants' Memorandum at p. 3 (citing deposition testimony), and Plaintiff's Memorandum at p. 3.

movement of vessels..." as demanded by the Fifth Circuit in *Barrett. Barrett,* 781 F.2d at 1075 (emphasis added). None of Plaintiff's diving work was closely related to the movement of vessels, nor was Plaintiff's work to service or aid the vessels. Plaintiff's work, while traditional maritime activity, may have aided in the *mission* or *task* of the vessel, but was in no way related to the *movement* of the vessel.

Failing to fit the narrow exception created by the *Barrett* court in footnote 13, Plaintiff must meet the court's fleet requirement. The fleet requirement was affirmed in several post-*Barrett* Fifth Circuit decisions, cited by both parties, which hold that a worker who is not assigned to an identifiable fleet of vessels cannot have Jones Act seaman status. *see Lirette v. N.L. Sperry Sun, Inc.,* 831 F.2d 554 (5th Cir. 1987); *Ardleigh v. Schlumberger, Ltd.,* 832 F.2d 933 (5th Cir. 1987); and *Langston v. Schlumberger Offshore Serv., Inc.,* 809 F.2d 1192 (5th Cir. 1987).

Plaintiff argues that he satisfies the fleet requirement because he spent eight out of his fourteen days of employment with Epic Divers, Inc. working off Torch, Inc. vessels. The court disagrees with Plaintiff's interpretation of the fleet requirement. *Barrett,* and the cases following, define "fleet" narrowly, giving the word its "ordinary meaning." The nexus binding a fleet of vessels must be common ownership or control. *Lirette,* 831 F.2d at 556. As stated in *Barrett,* "We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers...is totally obliterated." *Barrett,* 781 F.2d at 1074. Such is the case here.

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Fifth Circuit, addressing the summary judgment standard under Fed. R. Civ. P. 56(c) has ruled:

> [I]f the pleadings and accompanying evidentiary materials, when viewed in the light most favorable to the non-moving party raise no 'genuine issue as to any material fact,' and it appears that the moving party is entitled to judgment as a matter of law, the court may properly enter judgment.

Walker v. U.-Haul Co. of Miss., 734 F.2d 1068, 1070-71 (5th Cir. 1984) (citation omitted). In *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986), the Supreme Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

In this case, the facts are not in dispute. As outlined above, the parties provide similar accounts of Plaintiff's diving activity while employed by Epic Divers, Inc. In dispute are the legal conclusions to be drawn from these facts. This court finds that Plaintiff is not the type of maritime worker the Fifth Circuit meant to exclude from the fleet requirement outlined in *Barrett*. Further, Plaintiff's diving work for Epic Divers, Inc. on various vessels

failed to satisfy the fleet requirement. Given these undisputed facts, this court finds as a matter of law that Plaintiff was not a seaman within the meaning of the Jones Act.

Accordingly:

Motion of Defendants for Summary Judgment is **GRANTED.**

/s/ Illegible

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9551

Filed
Oct 20 1992

CHARLES ASHLEY,

Plaintiff-Appellant,

versus

EPIC DIVERS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for
the Eastern District of Louisiana

ON PETITION FOR REHEARING

(October 20, 1992)

Before REAVLEY, HIGGINBOTHAM and DUHE', Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied*.

ENTERED FOR THE COURT:

/s/ Thomas M Reavley

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Supreme Court, U.S.
FILED
FEB 10 1993
OFFICE OF THE CLERK

(2)

No. 92-1199

In The

Supreme Court of the United States

October Term, 1992

CHARLES ASHLEY,

Petitioner,

versus

EPIC DIVERS, INC. AND
CIGNA INSURANCE COMPANY,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the petitioner, who worked on short voyages on a number of unrelated vessels, can qualify as a Jones Act seaman without demonstrating the connection to a vessel or organized fleet of vessels that traditionally has distinguished seamen from longshoremen and other transitory maritime workers.

LIST OF PARTIES TO THIS PROCEEDING

1. Charles Ashley
2. Epic Divers, Inc.
3. CIGNA Insurance Company

Neither Epic Divers, Inc. nor CIGNA Insurance Company has any parent corporations, or any subsidiaries that are not wholly-owned.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

The petitioner, a commercial diver employed by Epic Divers, Inc., sued Epic and Epic's maritime employer's liability insurer, CIGNA Insurance Company (both hereinafter referred to as "Epic"), under the Jones Act, 46 U.S.C. §688, and the general maritime law, alleging that he sustained personal injuries while engaged in a dive in the Mississippi River near Avondale, Louisiana on November 20, 1990. Epic moved for summary judgment on the basis that the plaintiff was not a seaman within the meaning of the Jones Act, but a maritime worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* ("LHWCA").The two acts are mutually exclusive. *McDermott International, Inc. v. Wilander,* ___ U.S. ___, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991). The district court granted the Motion, ruling that the petitioner did not perform a substantial part of his work aboard a particular vessel or fleet of vessels, and did not perform traditional maritime activities.

In an unpublished *per curiam* opinion the United States Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit applied the test for seaman status from its decisions in *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959) and *Barrett v. Chevron, U.S.A., Inc.,* 781 F.2d 1067 (5th Cir. 1986) (en banc). The test requires a worker attempting to qualify as a Jones Act seaman to demonstrate: 1) that he either was permanently assigned to a vessel or fleet of vessels or performed a substantial part of his work on a vessel or fleet; and 2) that his work

contributed to the function or mission of the vessel or fleet. The Fifth Circuit framed the issue in this case as whether or not the petitioner performed a substantial part of his work on a fleet of vessels. The Fifth Circuit held that the petitioner, who worked on short voyages on a number of unrelated vessels, failed as a matter of law to demonstrate the attachment to a fleet of vessels required for Jones Act status, and was a transitory maritime worker.

The petitioner's petition for rehearing was denied. This petition for writ of certiorari followed.

B. Statement of the Facts

Epic is a company that supplies divers and diving services to its customers in various industries, including offshore oil and gas production, ship repair, and underwater construction. Epic does not own or operate vessels of any type.

The petitioner is a diver who began working for Epic in August, 1990. He worked a total of five separate diving jobs, none of which lasted more than four days, during his four-month term of employment. He was involved in an accident during the fifth and final diving job he performed for Epic.

The petitioner's first diving job for Epic commenced on August 16, 1990. Epic's customer, Torch, Inc. ("Torch"), asked Epic to supply a diver to check and replace anodes on an offshore pipeline. The petitioner was transported to a Torch-owned barge by a crew boat. The petitioner

worked only as a diver during the four-day job. He did not perform any maintenance work aboard the barge nor did he assist in the barge's navigation. When the petitioner left the job site on August 19, 1990, the barge remained on location to complete its mission.

The petitioner's second diving job lasted from August 23, 1990 through August 26, 1990. The petitioner dove from the barge LITTLE SHANE, owned by Torch. The petitioner performed only diving work, which involved setting a riser and boat bumpers on an offshore oil production platform. The petitioner reached the job site by crew boat. When the petitioner left the job site, the LITTLE SHANE remained offshore to complete its work.

The petitioner's third diving job lasted one day. Epic's customer, Chevron U.S.A., Inc. ("Chevron"), requested that Epic supply a diver to survey a mud mat underneath an oil production platform. This dive was performed off a stationary mud boat on September 9, 1990.

The petitioner's fourth diving job was also performed pursuant to a contract between Epic and Chevron. This job lasted from November 13, 1990 through November 17, 1990, during which time the petitioner installed a clamp on a Chevron oil production platform. In addition, he engaged in the "scrapping", or removal, of old natural gas flow lines in a natural gas production field. The scrapping work was performed from very small barges that were rigged specifically for the shallow waters of the natural gas field. The petitioner returned to shore each evening during the course of the job to sleep

in a bunkhouse. The scrapping work was performed in water shallow enough to allow the petitioner to stand and walk the bay bottom with his head above water for a good portion of the job.

The petitioner was injured on the first day of his final diving job for Epic. Avondale Industries, Inc. ("Avondale") had asked Epic to supply a diver to place a plywood cover over an open grate beneath the water line of a Navy ship which was docked for repairs at Avondale's shipyard on the Mississippi River. This job was expected to last only one day. Avondale provided a small boat for the petitioner's diving equipment. The boat was moored next to the dock.

The petitioner was never permanently assigned to any of the barges or dive boats he worked aboard during the four months he was employed by Epic. His work aboard any one vessel never exceeded four days. The petitioner never remained aboard any vessel for the duration of its voyage. The assortment of vessels he worked aboard were neither owned nor controlled by Epic. With the exception of the two Torch-owned barges on which the petitioner worked on his first two diving assignments, no two vessels off which the petitioner performed his work were owned by the same company. No evidence of record suggests that any of the vessels operated together or under one control. As the petitioner acknowledges, he spent all of his time working as a diver. He did not assist in navigation or maintenance of the vessels.

SUMMARY OF REASONS FOR DENYING THE WRIT

The Jones Act provides a cause of action in negligence against an employer of "any seaman" injured "in the course of his employment." The LHWCA provides a compensation remedy to land-based maritime workers. The two acts are mutually exclusive. *Wilander,* 111 S.Ct. at 813.

The Fifth Circuit has adopted a two-pronged standard by which it distinguishes land-based workers from sea-based workers. In this case the Fifth Circuit stated the standard as follows:

> To qualify as a Jones Act seaman, Ashley must show: (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet; and (2) his work contributed to the function or mission of the vessel or fleet.

App. to Pet. for Cert. A-2. The Fifth Circuit's test for seaman status is consistent with Supreme Court authorities stating that the key to seaman status is employment-related connection to a vessel in navigation. *Wilander,* 111 S.Ct. at 817. *Southwest Marine, Inc. v. Gizoni,* ___ U.S. ___, 112 S.Ct. 486, 492 (1991).

The petitioner misstates the first part of the Fifth Circuit's standard as requiring permanent attachment to a specific vessel or fleet of vessels as an absolute requirement for all seamen. In fact, the test is more liberal, and allows a finding of seaman status based on proof of substantial work on a vessel or fleet of vessels. The Fifth Circuit did not decide this case solely on the basis of the

petitioner's lack of permanent attachment to a specific vessel or fleet of vessels.

The petitioner relies on Fifth Circuit cases that have been overruled *sub silentio* in the Fifth Circuit. The petitioner also relies on Supreme Court authorities concerning longshoremen's remedies against vessel owners. The issue here involves the seaman status of a commercial diver. Moreover, the Supreme Court authorities relied on by the petitioner concerning the remedies available to longshoremen against vessel owners were overruled by Congress in the 1972 amendments to the LHWCA.

REASONS FOR DENYING THE WRIT

The Jones Act provides a cause of action in negligence against an employer of "any seaman" injured "in the course of his employment". 46 U.S.C. §688. The LHWCA provides a compensation remedy to land-based maritime workers. The LHWCA excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). In reviewing the history and interrelationship of the LHWCA and the Jones Act, this Court, in *Wilander,* noted that the Jones Act and the LHWCA are mutually exclusive:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. . . .
>
> With the passage of the LHWCA, Congress established a clear distinction between land-

> based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.

111 S.Ct. at 813.

The Fifth Circuit has adopted, in its decisions in *Robison* and *Barrett*, a two-pronged test by which it distinguishes land-based workers from sea-based workers. However, the petitioner misstates the first prong of the Fifth Circuit's test for seaman status as requiring permanent attachment to a specific vessel or a specific commonly-owned fleet of vessels as "an absolute requirement for all seamen under all circumstances". Pet. for Cert., p. 7. In fact, the first prong of the test can be satisfied by substantial work on a particular vessel or fleet of vessels.

The petitioner asks this Court to grant the writ based on perceived inconsistencies between his version of the Fifth Circuit's test for seaman status and this Court's decisions in *Wilander, Reed v. Steamship Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963), and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488 (1967). The writ should be denied because the petitioner has misstated the Fifth Circuit's test for seaman status in his petition and because the Fifth Circuit's test for seaman status is consistent with Supreme Court authorities.

A. The Petitioner has Misstated the Fifth Circuit's Test for Seaman Status.

In *Robison*, the court held that there is an evidentiary basis for a Jones Act case to go to the jury on the question of seaman status:

> 1) if there is evidence that the injured worker was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and
>
> 2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779.

The two-pronged *Robison* standard contemplated seaman status in terms of a worker's connection with a single vessel. In *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), the Fifth Circuit held for the first time that nothing in the *Robison* test precluded seaman status by virtue of a connection to "several specified 'vessel[s]'." 280 F.2d at 528. In subsequent decisions, the Fifth Circuit used *Braniff* as the basis for allowing seaman status on proof of an assignment to an identifiable group of vessels. This extension of *Robison* was affirmed by the Fifth Circuit, sitting *en banc*, in *Barrett*. 781 F.2d at 1074-1076.

After *Robison* was liberalized by the Fifth Circuit to include the fleet-of-vessels standard, there were four ways that a worker could qualify as a seaman. First, the worker could be permanently assigned to a specific vessel. Second, the worker could be permanently assigned to a fleet of vessels. Third, a worker not permanently

assigned to a vessel could qualify as a seaman by performing a substantial part of his work on that vessel. Fourth, a worker could qualify as a seaman by performing a substantial part of his work on a fleet of vessels.

The petitioner argues that the Fifth Circuit, by its ruling in this case, has imposed a requirement of permanency in all seaman status cases. The Fifth Circuit has made no such imposition. The first prong of its seaman status test can be satisfied by showing either permanent attachment to, or substantial work aboard, a vessel or fleet of vessels. In this case the Fifth Circuit stated:

> To qualify as a Jones Act seaman, Ashley must show: (1) he was permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet; and (2) his work contributed to the function or mission of the vessel or fleet.

App. to Pet. for Cert. A-2.

This case is not about permanent attachment. The issue here, as the Fifth Circuit stated in its *per curiam* opinion, is whether or not the petitioner performed a substantial part of his work aboard a fleet of vessels, so as to distinguish the petitioner from a transitory maritime worker. App. to Pet. for Cert. A-2, A-3. The petitioner never seriously argued that he was permanently attached to any one of the five vessels from which he worked during his employment with Epic. Indeed his connection to any specific vessel, far from being permanent, did not even amount to a substantial part of his work. The petitioner did not visit any one vessel for more than four days. Since the vessels were not acting together or under one control, the Fifth Circuit concluded that they did not

constitute a fleet, and that the petitioner could not demonstrate a connection to vessels sufficient to confer seaman status.

Rule 15.1 of the Rules of the Supreme Court of the United States requires a brief in opposition to a petition for certiorari to address:

> [A]ny perceived misstatements of fact or law set forth in the petition which would have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case.

The issues presented by the petitioner in his writ for certiorari should not be decided by the Court. The Fifth Circuit clearly grounded its decision, not on any requirement of permanent attachment to a vessel, but on the question of whether the petitioner could demonstrate connection to a fleet of vessels by showing he performed a substantial part of his work aboard a group of vessels acting together or under one control.

B. The Fifth Circuit's Test for Seaman Status is Consistent with Supreme Court Authorities.

In its recent decisions in *Wilander* and *Gizoni,* this Court emphasized that connection to vessels is the key to seaman status. In *Wilander,* the plaintiff was injured while assigned to a single vessel, the M/V GATES TIDE, a paint boat chartered to Wilander's employer. Wilander sued his

employer seeking recovery under the Jones Act for his employer's negligence. His employer moved for summary judgment and the district court denied the motion. The jury found that Wilander satisfied both prongs of the *Robison* seaman status test. 111 S.Ct. at 809.

On appeal to the Fifth Circuit, the determination of seaman status was affirmed. *Id.* Wilander's employer had asked the Fifth Circuit to reject the *Robison* requirement that a seaman "contribut[e] to the function of the vessel or to the accomplishment of its mission" and replace the second prong of the *Robison* test with a requirement that a seaman aid in the navigation of the vessel. The "aid in navigation" test was adopted by the Seventh Circuit in *Johnson v. John F. Beasley Construction Company,* 742 F.2d 1054 (7th Cir. 1984). The Fifth Circuit reaffirmed the rule of *Robison* and rejected the *Johnson* test. This Court granted certiorari to resolve the conflict between the *Robison* and *Johnson* tests with respect to the transportation/navigation function requirement, and affirmed the Fifth Circuit. 111 S.Ct. at 809-810.

In rejecting the aid to navigation test, this Court stated:

> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.

> See generally Robertson, A New Approach to Determining Seaman Status, 64 Texas L.Rev. 79 (1985). It is not the employee's particular job that is determinative, but the employee's connection to a vessel.

111 S.Ct. at 817.

This Court then stated:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. . . . In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status.

Id.

This Court cited parts of these passages from *Wilander* in *Gizoni,* a case involving the seaman status of a worker whose occupation was one enumerated in the LHWCA. In rejecting the concept that seaman status depends on job title or occupation, this Court again emphasized that "The key to seaman status is employment-related connection to a vessel in navigation . . . " 112 S.Ct. at 492 (citing *Wilander,* 111 S.Ct. at 817). This Court has thus underscored the importance of both the first prong of the *Robison* test and the second prong, which requires that a worker's duties contribute to the function of the vessel or to the accomplishment of its mission.

The Fifth Circuit's liberal first prong of its test for seaman status allows a worker to qualify as a seaman not only by proving connection to a single vessel but also by proving connection to a fleet of vessels. In *Barrett*, the court, mindful of the land-based/sea-based distinction made by Congress in enacting the LHWCA, defined the term "fleet" as follows:

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

781 F.2d at 1074. This definition of "fleet" prevents classic transitory maritime workers, such as longshoremen and ship repairers, who spend virtually all of their time working for relatively short periods of time aboard unconnected vessels, and who owe their allegiance to a land-based employer, from qualifying as Jones Act seamen.

The *Barrett en banc* decision raised, but did not decide, the question of whether an exception to the fleet requirement might be made for some workers. In its recent decision in *Bach v. Trident Steamship Company, Inc.*, 920 F.2d 322 (5th Cir. 1991), *vacated* ___ U.S. ___, 111 S.Ct. 2253, 114 L.Ed. 2d 707, *reinstated on remand*, 947 F.2d 1290 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1996 (1992), the Fifth Circuit answered this question in the negative:

> Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never

> made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels. We decline the invitation now to make a wholesale exception to a test that has served us for so long.

920 F.2d at 326.

The petitioner argues that the *Robison* test should be cast aside in favor of a test he gleans from two Fifth Circuit cases, *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), and *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984). The petitioner contends that *Wallace* and *Bertrand* both stand for the proposition that any group of vessels aboard which a worker happens to work can qualify as a fleet for purposes of the first prong of the *Robison* test. The petitioner argues that he would qualify as a seaman under the holdings in *Bertrand* and *Wallace*.

Barrett effectively overrules *Wallace*, since *Wallace*, decided three years earlier, was grounded on the premise that "fleet" meant any group of vessels an employee happened to work aboard. 727 F.2d at 434-435. *Wallace* is also factually distinguishable from this case, since the plaintiff there was to be assigned permanently to one vessel. 727 F.2d at 430. Although the Fifth Circuit did not overrule *Bertrand* in its *Barrett* decision, *Bertrand* does not survive *Bach*, in which the Fifth Circuit expressly made the fleet requirement applicable to all workers trying to demonstrate seaman status by connection to more than one vessel. 920 F.2d at 326.

The Fifth Circuit's seaman status test is consistent with this Court's recent decisions in *Wilander* and *Gizoni*.

The petitioner is attempting to capitalize on a perceived conflict between *Wallace* and *Bertrand* on the one hand, and *Barrett* and *Bach* on the other. *Wallace* and *Bertrand* are anomalies in a long line of seaman status cases in the Fifth Circuit that emphasize connection to vessels as the key to seaman status. This Court should not grant certiorari to resolve a conflict that has already been settled within the Fifth Circuit.

The petitioner also argues that the Fifth Circuit's so-called permanency requirement conflicts with this Court's decisions in *Reed* and *Jackson*. Petitioner argues that since divers are assigned to work on vessels belonging to others, they are necessarily assigned to vessels not under common ownership or control. The petitioner argues that a diver's employer ought not be able to escape liability under the Jones Act by contractual arrangements with third parties, citing *Reed* and *Jackson*.

As the petitioner concedes, when the *Reed* and *Jackson* cases were decided longshoremen had the right to sue a vessel owner for damages under the doctrine of unseaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). In both *Reed* and *Jackson*, so-called "Sieracki seamen" sued shipowners who had employed the longshoremen directly to unload vessels, instead of hiring a stevedore who employed longshoremen. Since longshoremen could not sue their employers directly because of the LHWCA's exclusive recovery feature, the defendants in *Reed* and *Jackson* argued that the longshoremen in those cases could not sue the ship, since the ship was acting as an employer. *Jackson*, 87 S.Ct. at 1421-1422. In *Reed* and *Jackson*, this Court concluded that longshoremen employed directly by

shipowners could sue the shipowners directly despite the exclusive recovery provisions of the LHWCA. *Reed*, 83 S.Ct. at 1353; *Jackson*, 87 S.Ct. at 1422.

The legal and theoretical underpinnings of the *Reed* and *Jackson* cases have long been legislatively removed. The *Sieracki* case, decided in 1946, was overruled in 1972 when Congress amended the LHWCA to eliminate a longshoreman's unseaworthiness remedy against a vessel. *Wilander*, 111 S.Ct. at 813.

Most importantly, however, the issue in both *Reed* and *Jackson* was not the status of the workers involved, but rather the remedies available to longshoremen whose status as "Sieracki seamen" was undisputed. Here the issue is whether the petitioner has the status of a Jones Act seaman. In fashioning his argument based on *Reed* and *Jackson*, the petitioner assumes that all divers are seamen and then argues that all divers will lose their seamen's rights if the Fifth Circuit's decision is allowed to stand. In actuality, the connection of many divers with vessels more closely resembles that of longshoremen or ship repairers. Many divers, like longshoremen, typically do not work exclusively aboard one vessel or a group of vessels acting together or under one control. The nature of the diving business dictates that some diving companies do not operate vessels, and that divers may not have a substantial connection to particular vessels. Because the petitioner was not assigned to a particular vessel or a fleet of vessels, he is a transitory maritime worker whose remedy is the LHWCA.

CONCLUSION

Since the petitioner has misstated the seaman status test employed by the Fifth Circuit in this case, and since the Fifth Circuit's test for seaman status is consistent with all decisions of this Court, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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